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To: Microsoft ATR
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Subject: Microsoft Settlement

Comments on the Microsoft Settlement

Here is the good news if the Microsoft settlement is approved: Although the company may face litigation from competitors, a few consumers, the European Union, and recalcitrant state attorneys general, at least the federal antitrust lawsuit won't be around to drain Microsoft's energies and undermine economic growth so essential to the post-September 11 recovery.

>From a longer-term perspective, the Microsoft antitrust dispute, which has been festering in one form or another since the Federal Trade Commission opened its investigation in 1991, produced nothing but losers. There are no long-term winners. To settle the case, Microsoft will be making more concessions than is justified by the D.C. Circuit's opinion. In the meantime, consumers had to pick up the tab while high-tech executives wasted resources on politicking instead of developing the kinds of integrated products that customers demand.

The settlement addresses and corrects, with minor exceptions, each objection raised by the D.C. Circuit in affirming Judge Jackson's holding of monopoly maintenance. Microsoft may not retaliate against other companies for supporting competing software; or enter into exclusive agreements with software developers, Internet content providers, or Internet access providers. Nor may Microsoft prevent PC makers and consumers from installing a rival operating system, or removing Microsoft's "middleware" products and installing rival middleware. Further, Microsoft must disclose and license its applications programming interfaces (APIs) to software developers; and charge uniform, published prices (except for volume discounts) to its 20 top PC-maker clients.

The principal Microsoft "transgression" not addressed in the settlement is the commingling of operating system and browser code. Of course, that problem is trivial as long as the consumer and PC maker are not forced to use, and can actually uninstall, Microsoft's browser.

In two critical respects, the settlement goes beyond what the appellate court directed. First, the court found that Microsoft had suppressed competition in the middleware market as a means of maintaining its Windows monopoly. Middleware, according to the court, consists of products that expose APIs and thereby compete against traditional operating systems. But the settlement agreement defines middleware more broadly, to include not only browsers but also products like email, instant messaging, and media players. Those products do not expose

APIs; they do not compete against Windows; yet Microsoft will be compelled to treat rival "middleware" products as if the court had found "which it did not" that bundling those products somehow constituted an illegal tying arrangement.

Second, the settlement dictates that Microsoft will have to disclose its server protocols so that non-Microsoft servers (like those produced by IBM, Oracle, Sun Microsystems, and Novell) will be able to interoperate with Windows. The allegation, first leveled by Sun in a complaint filed with the European Union two years ago, is that Microsoft is attempting to extend its PC monopoly to the server market by making newer versions of Windows incompatible with servers other than Microsoft's. But the newest version of Windows (XP), just released on October 25, has a miniscule share of the operating system market. Quite simply, there is no monopoly to leverage. Older versions (Windows 95 and 98) are perfectly compatible with non-Microsoft servers, which by the way supply about 60 percent of the server market. Most important, the server issue was never part of the Justice Department's case. On that issue, there was no complaint, no trial, no evidence, and no verdict "just a restriction on Microsoft's behavior."

There's a lesson in all of this. Two years ago, an attempted settlement mediated by appellate judge Richard Posner came to nothing, reportedly because of several intractable attorneys general. Judge Posner had little to say about his efforts until September 2000 when, in a speech, he lambasted the states' role in antitrust litigation, accused them of being captured by competitor interests, and suggested that they should limit themselves to price fixing cases involving goods sold to the state.

That's good advice. Ten years have lapsed since the Microsoft case first unfolded. Silicon Valley, supposed bastion of entrepreneurship, has become part of the problem. Multiple governmental entities, responsive to the parochial interests of rival businesses, initially combined to challenge Microsoft. Now, with that challenge resolved to the satisfaction of almost everyone, nine states might dawdle just long enough to foul the country's near-term economic recovery. It's time to shut down this lawsuit and let the software industry get back to serving customers.

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These comments are extracted from a longer article by Robert A. Levy

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